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**BY ELECTRONIC FILING**

Honorable Cathy Seibel  
The Hon. Charles L. Brieant Jr. Federal Building  
and United States Courthouse  
300 Quarropas Street  
White Plains, New York 10601

**RE: Xinuos, Inc. v. IBM Corp., et al., No. 7:22-cv-09777-CS (S.D.N.Y.)  
Request for Informal Conference to Begin Limited Discovery**

Dear Judge Seibel:

On behalf of Plaintiff Xinuos, Inc., I write to respectfully request an informal pre-motion discovery conference pursuant to Local Rule 37.2 and this Court's Individual Rule 2.A.<sup>1</sup>

Plaintiff requests the Court issue an order pursuant to Federal Rule 26(d)(1) requiring IBM to make its source code available for inspection under protective order. IBM's source code is at the core of this copyright case and its production will get this case started in earnest, enable the parties to better access their positions, and allow them to craft a roadmap for this case going forward. Production of source code will not be burdensome.

Almost nothing has happened in this case for two and half years. Plaintiff filed its Complaint on March 31, 2021. D.I. 1. It took 15 months for the District Court in the District for the Virgin Islands to rule on a motion to change to this venue. See D.I. 56 (motion fully briefed on August 11, 2021); D.I. 75-76 (motion to change venue decided on November 14, 2022). In this venue, Defendants moved to dismiss the antitrust claims and moved for summary judgment on the copyright claim January 27, 2023. D.I. 111. On February 17, 2023, Xinuos served its

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<sup>1</sup> On Tuesday, October 31, 2023, counsel for Plaintiff notified counsel for Defendants via email about their intent to request that limited discovery begin, and asked whether a conferral was necessary. Receiving no response, counsel for Plaintiff emailed counsel for Defendants a second time on Monday November 6, 2023, stating that if no response is provided Plaintiff would file this letter. Today, counsel for Defendants responded that Defendants "will not join in Xinuos's request."



oppositions. D.I. 114. On March 6, 2023, Defendants served its replies, and then all of the papers were filed on the docket. D.I. 118-132.

Under Federal Rule 26, the court may authorize “discovery from any source before the parties have conferred as required by Rule 26(f).” “[T]he moving party must satisfy a ‘flexible standard of reasonableness and good cause.’” *Id.* ((quoting *Ayyashi v. Bank Al-Madina*, 233 F.R.D. 325, 327 (S.D.N.Y. 2005)). *Kreit v. Byblos Bank S.A.L.*, 2023 WL 3005852 at \*1 (S.D.N.Y. Mar. 28, 2023).

Plaintiff alleges that IBM infringed its copyrights in server operating system source code. Considering that IBM did not move to dismiss the copyright claim and the prolonged delay to date, the Court should grant Plaintiff’s request for limited source code discovery. This approach addresses the Court’s sole concern with starting discovery in January 2023—having the parties “spen[d] a lot of time and money that will have turned out to be a waste.” D.I. 109 at 10-11. Source code discovery merely requires a protective order and is significantly less burdensome than the collection, investigation, and production of documents, or responding to interrogatories, or preparing for and sitting for depositions.

At the aforementioned hearing, this Court stated that “I understand this case has been kicking around a while – not the fault of anybody in this room – but I want to try to figure out what’s the most sensible way to move forward.” *Id.* at 3. This remains true. But the delay is not without consequence. Memories fade and evidence goes stale. Justice delayed is justice denied. Two and a half years after it was filed, no dispositive motion has been decided and no discovery of any kind has taken place in this case. Plaintiff believes it is time to start to get to the bottom of the allegations in the complaint, which also has the potentially to narrow the issues.

For the foregoing reasons, Plaintiff requests an informal pre-motion discovery conference to begin limited discovery.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gabriel M. Ramsey', written over a light blue horizontal line.

Gabriel M. Ramsey